IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC.,

Plaintiffs-Appellants,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association, GOLDEN GATE RESTAURANT ASSOCIATION, a corporation, and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,

Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI.

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Petitioners Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., plaintiffs below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered September 17, 1976, and reported at 542 F.2d 1076 (Appendix A), which affirmed the judgment of the United States District Court for the Northern District of California entered May 8, 1973 (Appendix B), granting defendants' motion to dismiss the complaint on the ground that the conduct alleged in the complaint to violate

Section 1 of the Sherman Act, 15 U.S.C. § 1, was immune from antitrust scrutiny under the First Amendment, and which also affirmed the order of the same District Court, entered June 1, 1973 (Appendix C), denying plaintiffs' motion to set aside the judgment and for leave to file an amended complaint.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered September 17, 1976. Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc was denied November 2, 1976 (Appendix D). This petition is being filed within 90 days of the aforesaid date of November 2, 1976.

Questions Presented.

1. Whether concerted attempts to injure a business rival by abusing the adjudicatory process, with the aim of denying the victim meaningful access to the process, or of directly impairing the victim's competitive position by burdening him with repetitious and baseless litigation, are immune from attack under Section 1 of the Sherman Act, 15 U.S.C. § 1, unless the attempts consist of or are accompanied by conduct external to the adjudicatory process.

2. Whether a special pleading standard, which departs radically from existing standards by requiring much more detailed and specific factual allegations than are called for under the notice pleading requirements of Rules 8 and 12 of the Federal Rules of Civil Procedure, applies in any action in which relief is sought for "conduct which is prima facie protected by the First Amendment."

Statutes Involved.

The Circuit Court below ruled that the activities alleged were immune from Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." July 2, 1890, c. 647, § 1, 26 Stat. 209; August 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Also at issue is the Court's decision to deviate from the liberal pleading requirements of Rules 8(a)(2), 8(f), and 12(b)(6) of the Federal Rules of Civil Procedure, which provide in pertinent part:

> Rule 8. "(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .
>
> * * *
>
> "(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice."
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> Rule 12. "Defenses and Objections. . . .
>
> ". . .
>
> "(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the

pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . ."

Statement of the Case.

A. The Nature of the Case.

Petitioners Franchise Realty Interstate Corporation ("FRIC") and McDonald's Systems of California, Inc. are two subsidiaries of McDonald's Corporation, which through its subsidiaries operates and licenses others to operate family-style restaurants under the name of McDonald's throughout the United States. FRIC is the corporate subsidiary through which McDonald's Corporation secures sites for the building of restaurants. McDonald's Systems of California, Inc. is principally engaged in the business of licensing McDonald's restaurants in the State of California.

In 1973, FRIC and McDonald's Systems of California, Inc. (hereinafter referred to jointly as "the Company") commenced this federal antitrust action in the United States District Court for the Northern District of California, alleging that respondents, two associations of restaurant and hotel employers and a labor union, had engaged in a conspiracy to restrain trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The thrust of the Company's complaint (annexed hereto as Appendix E) was that respondents (defendants below) had taken concerted action aimed at eliminating McDonald's restaurants as a competitive factor in the restaurant business in the City of San Francisco.

The issues in this case revolve around the legal sufficiency of the allegations in the Company's complaint. The complaint alleged that the reputation of

McDonald's restaurants for serving high quality food at low prices in a congenial family atmosphere (no liquor is served and there are no cigarette vending machines) has contributed to an ever-increasing demand for McDonald's products and locations (App. E, para. 6), and that competing restaurants in San Francisco have evidenced concern about McDonald's expanding business (*id.* para. 9). The complaint alleged that in 1971 the Company, which operates two restaurants in San Francisco (*id.* para. 10), applied for licenses for the operation of three more restaurants, and that such licenses were granted by the San Francisco Department of Public Works, which certified that in each instance the proposed restaurant would comply with all of the applicable city and county laws, codes, ordinances, and regulations. (*Id.* paras. 11-12.)

The complaint went on to allege that the defendants, acting in bad faith and with the purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants (*id.* para. 17), "induced and persuaded" the San Francisco Board of Permit Appeals to overrule the issuance of the permits. (*Id.* para. 13.) It was alleged that defendants, with the intent of foreclosing the Company "from free and unlimited access" to the Board of Permit Appeals (*id.* para. 17), had acted in concert to "oppose each and every permit" granted to the Company (*id.* para. 16(a)), and that the Board's actions were procured through this "consistent, repeated and baseless opposition." (*Id.* para. 17.) The opposition was alleged to be baseless because "each defendant knew . . . that the Company had intended to and did comply with all of the necessary code requirements . . . and that the Board of Permit Appeals of the City and County of San Francisco

had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco." (*Id.* para. 18.) Thus, each defendant knew "that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with the Board of Permit Appeals (other than its President), to subvert the constitutional function of that Board . . ." (*Id.*)

The Company alleged further (in a proposed second amended complaint pertinent parts of which are annexed hereto as Appendix F) that defendants had secretly sponsored the appearances before the Board of ostensibly disinterested witnesses (App. F, para. 17(b)), and that defendants had maliciously instigated and sponsored (sometimes secretly) proceedings against McDonald's before other adjudicatory bodies, including the Human Rights and Labor Law Enforcement Commissions (*id.* para. 17(e)). Finally, the Company alleged that defendants had engaged in several activities that were not directed at governmental bodies at all, but rather were intended to inflict direct business injury on McDonald's; these activities included the dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's, the harassment of customers at existing McDonald's restaurants, and the disruption, accompanied by illegal picketing, of essential supplies to existing McDonald's restaurants. (*Id.*)

B. Proceedings in the District Court.

The Company's complaint was filed on January 3, 1973. On February 26, 1973 the Company, pursuant

to a stipulation, filed an amended complaint which corrected an error in the naming of the parties defendant, but did not substantively modify the original pleading. Defendants then moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the amended complaint for failure to state a claim. After memoranda were submitted and oral argument was heard, the District Court on May 8, 1973 filed a Memorandum of Opinion granting defendants' motion to dismiss without leave to amend on the ground that the acts alleged in the complaint were protected from antitrust scrutiny under the First Amendment. On May 14 and 22, 1973, judgments were entered in favor of defendants.

The Company thereupon submitted a Motion to Set Aside the Judgment and for Leave to File a Second Amended Complaint. The District Court on June 1, 1973, following oral argument, denied this motion, whereupon the Company filed a Notice of Appeal to the Ninth Circuit.

C. Proceedings in the Court of Appeals.

The Ninth Circuit, by a two to one margin, affirmed the District Court's dismissal of the complaint and its denial of leave to file the second amended complaint. The Court asserted, 542 F.2d at 1079-80, 1086, that the complaints alleged nothing more than efforts on the part of defendants to influence public officials to take governmental action, and that such efforts were insulated from antitrust liability by the doctrine of *Eastern Railroad Presidents Conf. v. Noerr Motor Freight,* 365 U.S. 127 (1961). The Court ruled that the allegations did not invoke the *Noerr* "sham exception" for conduct ostensibly directed toward influencing

governmental action which is actually aimed at directly interfering with the business relationships of a competitor (see 365 U.S. at 144), because that exception "is limited to situations where the defendant is not seeking official action by a governmental body. . . ." 542 F.2d at 1081.

The Court held further that the complaints did not state a cause of action under *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), and *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973). Those cases, elaborating on the meaning of the *Noerr* sham exception in the context of administrative or judicial proceedings, held that there is no antitrust immunity for efforts to bar competitors from meaningful access to adjudicatory tribunals or for efforts to injure competitors by abusing the adjudicatory process. See *Trucking Unlimited,* 404 U.S. at 512-13; *Otter Tail,* 410 U.S. at 380. The Court held that these cases withheld the *Noerr* immunity only from activities external to the adjudicatory process which are aimed at completely foreclosing a competitor's access to that process, 542 F.2d at 1081 & n. 4.

Among the external activities cited by the Court as evidence of an intent to completely foreclose access are widespread publicity by defendants of a campaign to oppose every effort by a competitor to avail himself of the adjudicatory process, or the communication directly to the competitor of threats to carry out such a plan of expensive and time-consuming opposition. *Id.* It is unclear whether in the Court's view these

activities must succeed in depriving the victim of access to the adjudicatory process, as the Court seems to imply when it observes that "[n]owhere is it alleged that McDonald's was prevented from applying for permits, or from having a hearing before the Board." *Id.* at 1079. It is certain, however, that in the Court's view concerted activity that abuses the adjudicatory process for an anticompetitive purpose, but that is unaccompanied by activities external to the process that are aimed at denying access to it, does not violate the Sherman Act.

Since the Company's complaint alleged that defendants had agreed on a plan "to foreclose the Company from free and unlimited access" to the Board (App. E, para. 17), the Court recognized that under the notice pleading requirements of the Federal Rules of Civil Procedure the omission of specific references to the external access-barring activities demanded by the Court's substantive standard would not ordinarily justify dismissal at the pleading stage, but rather might await the results of discovery. *See* 542 F.2d at 1082. The allegations in the proposed second amended complaint that defendants had engaged in a malicious publicity campaign and had harassed McDonald's customers and disrupted McDonald's restaurant deliveries (App. F, para. 17(e)) might also await factual supplementation at a later stage. But the Court, summarily dismissing both sets of allegations as "conclusory" (542 F.2d at 1082, 1085), affirmed the dismissal of the complaint and the denial of leave to file the proposed second

amended complaint on the ground that a special and unprecedented pleading rule must be applied to safeguard the First Amendment right to petition a governmental body. The Court defined this special pleading rule very broadly:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

Chief Judge Browning vigorously dissented from the majority's result, alleging that in order to reach its result the majority had distorted the substantive rule applied in two recent Supreme Court decisions, and had created "an unwarranted exception to the standard for pleading laid down in the Federal Rules of Civil Procedure and forcefully restated in *Conley v. Gibson*, 355 U.S. 41, 45-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." 542 F.2d at 1086-87.

REASONS FOR GRANTING WRIT.

I

The Majority's Ruling That Concerted Efforts to Injure a Competitor by Abusing the Adjudicatory Process, With the Aim of Denying the Competitor Meaningful Access to the Process, Are Immune From the Sanctions of the Antitrust Laws Unless Accompanied by Conduct External to the Adjudicatory Process, Flatly Contradicts Two Decisions of This Court and Decisions of Other Circuits, and Constitutes a Serious Misreading of the Sherman Act That Would Shelter Wholly Unmeritorious Schemes to Eliminate or Exclude a Competitor.

It has long been established that joint collaborative action to eliminate or exclude a competitor is so unduly restrictive of competition as to constitute a *per se* violation of Section 1 of the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). An exception to this rule was carved out in *Eastern Railroad Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that a lobbying effort and publicity campaign by a group of railroads aimed at bringing about the passage of legislation restricting the trucking industry was immune from Sherman Act sanction. Stressing that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.* at 135, the Court reasoned that a contrary construction of the Act would curtail the flow of valuable information to lawmakers from the citizens and groups whose interests they are supposed to represent, *id.* at 137-38.

The Court in *Noerr* recognized that the interest in preserving the flow of information from citizens to lawmakers does not justify the conferral of immunity upon activities which abuse the processes of government. "There may be situations," said the Court, "in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

The Court elaborated on the so-called "sham exception" to *Noerr* in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which involved an alleged conspiracy by a group of truckers to indiscriminately resist applications filed by competing truckers with regulatory agencies to acquire or transfer operating rights. The Court held that the allegations in plaintiffs' complaint that defendants "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" stated a valid cause of action, outside the protection of *Noerr*, under the Sherman Act. *Id.* at 512. It stated that abuse of the administrative and judicial processes may produce the illegal result of effectively barring access to the agencies and courts, *id.* at 513, and cited as examples of abuse the institution of proceedings "with or without probable cause, and regardless of the merits of the cases," *id.* at 513. It added that "[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." *Id.*

The Court reiterated in a later opinion, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), that *Trucking Unlimited* holds "that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*." In *Otter Tail* the Court, after remanding to the district court, affirmed that court's decision that a power company's institution of repetitive and baseless lawsuits to extend its retail power monopoly violated the Sherman Act. *See* 417 U.S. 901 (1974). Defendant's litigation campaign in *Otter Tail* was intended not to deny its competitors access to adjudicatory tribunals, but rather to directly impair their ability to raise capital by encumbering their financial statements with notices of pending litigation. This Court's decision recognizes that the interest in safeguarding citizenry access to the organs of government is not served by such abuses of the governmental process.

As Judge Browning, dissenting from the majority opinion below, put it, "[t]he complaint in this case alleges precisely what *Trucking Unlimited* holds to be an antitrust violation." 542 F.2d at 1087. In Judge Browning's words:

> ". . . McDonald's alleged that defendants combined 'to oppose, repeatedly, baselessly and in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants.' McDonald's also alleged that defendants, by their repeated and baseless opposition to every McDonald's application, intended to and did fore-

close McDonald's from 'free and unlimited access'[1] to the Board and 'thereby interfere[d] directly with the business activities and relationships of a competitor.' Complaint, paragraph 18.

"These allegations, together with averments of anticompetitive purposes and effect, state an antitrust claim under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972): 'A combination of entrepreneurs to harass and deter their competitors from having "'free and unlimited access'" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established.' *Id.* at 515, 92 S.Ct. at 614." 542 F.2d at 1086.

The majority at one point questions the Company's allegations that defendants' opposition to its permits was baseless, observing that "[w]e find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here." 542 F.2d at 1079. The Company's complaint explained that defendants' opposition to its permits was baseless because defendants knew that McDonald's, which has a reputation for serving high quality food at low prices in a congenial family atmosphere (App. E, para. 6), would satisfy all of the applicable city and county regulations (*id.* para. 18) and that the Board had no authority to act as an economic board of review (*id.*). On the majority's theory, defendants who abuse the adjudicatory process so adroitly that they prevail before the decisionmaking body are automatically insulated from Sherman Act liability; yet presumably defendants who are not successful have caused the victim no injury (aside perhaps from the comparatively insignificant costs of the litigation), creating a "heads we win, tails you lose" situation for the defendant. As Judge Browning observed,

> "[t]he complaint in *Trucking Unlimited* 'did not allege that the presentations made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support' . . . The antitrust defendants on both *Trucking Unlimited* and *Otter Tail* sought the favorable action of the tribunal when and if they could get it. The *Trucking Unlimited* complaint alleged that the antitrust defendants 'instituted the proceedings and actions . . . *with* or without probable cause, and *regardless of the merits* of the cases.'" 542 F.2d at 1088 n. 4. (Citations omitted.)

As Judge Browning goes on to point out, it is the abusiveness of the petitioning practices—the fact that they are undertaken *regardless* of whether there is probable cause—that is determinative. *Id.*

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[1]As Judge Browning observes: "It was unnecessary for appellants to allege that they were in fact foreclosed from access to the Board. It was neither alleged in the complaint in *Trucking Unlimited* nor proven in the trial in *Otter Tail* that the ability of competitors to present their views was actually foreclosed or that competitors were either prevented from filing applications with the tribunal or from obtaining a hearing. It is enough to allege a denial of *meaningful* access." 542 F.2d at 1088 n. 4. (Emphasis supplied.)

The complaints filed by the Company included not only the allegations of access-barring repeated and baseless opposition that were sustained in *Trucking Unlimited* and *Otter Tail,* but also allegations that defendants had abused the adjudicatory process in other ways that were condemned in *Trucking Unlimited* but that were not alleged in the complaint in that case. Thus, the proposed amended complaint[2] alleges that witnesses before the Board were secretly sponsored by defendants (App. F, para. 17(b)); *Trucking Unlimited* states expressly that misrepresentations are not immunized when used in the adjudicatory process. 404 U.S. at 513. The first amended complaint alleges that defendants may have acted in concert with the Board (other than its President) (App. E, para. 18); a similar allegation was sustained in *Harman v. Valley National Bank,* 339 F.2d 564 (9th Cir. 1964), a case which won the specific endorsement of *Trucking Unlimited,* 404 U.S. at 513. Finally, the proposed amended complaint (App. F. para. 17(e)) alleges that defendants engaged in several activities that were not directed at the Board at all, but rather were aimed at inflicting direct business injury on McDonald's; these activities, which include the dissemination of false and malicious

[2]The Company moved to file the proposed amended complaint within a few days after the District Court's dismissal of the first amended complaint; since the company was guilty of no undue delay, bad faith, or dilatory motive, and defendants would not have been prejudiced, leave to amend should have been forthcoming under Rule 15(a), Fed. R. Civ. P., unless the proposed amended complaint would also have been subject to dismissal for failure to state a claim. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). The majority below upheld the District Court's denial of leave to file the proposed complaint on the ground that its allegations, like those in the original complaint, failed to state a claim under the majority's substantive standard. 542 F.2d at 1085.

statements through the news media, the harassment of customers at existing McDonald's restaurants, and the disruption of essential McDonald's restaurant supplies by means of illegal picketing, fall squarely within the "sham exception" announced in *Noerr, see* 365 U.S. at 144.

Thus, the complaints filed by the Company were, if anything, much more detailed than those sustained in *Trucking Unlimited* and *Otter Tail.* Nevertheless, the majority conjures out of those cases a rule that only activities external to the adjudicatory process which are aimed at completely foreclosing a competitor's access to that process are denied immunity, 542 F.2d at 1081, & n. 4, and that, more specifically, in the absence of any allegation that defendants had widely publicized or communicated to the Company threats of expensive and time-consuming litigation, the Company's complaints were fatally deficient, *id.* As Judge Browning notes in dissent, "[n]ot only does the majority cite no authority for this rule, but *Trucking Unlimited* and *Otter Tail* are exactly to the contrary." 542 F.2d at 1087. The defendants in those two cases, he adds,

> "did not lose antitrust immunity because they did anything in addition to participating in administrative and judicial processes. Immunity was lost because the defendants *abused* those processes by a pattern of conduct designed to eliminate competition by harassing and deterring competitors in their use of such processes and thus deny them *meaningful* access to such processes." 542 F.2d at 1088. (Emphasis supplied.)

Judge Browning observes that "[*n*]*othing in any of the opinions in the Otter Tail litigation suggests*

that the result reached depended upon the fact that threats were used. The opinions refer only to a pattern of unsubstantial litigation employed to maintain a monopoly." 542 F.2d at 1088 (emphasis supplied); *see id.* at n. 3. Similarly, *Trucking Unlimited* states specifically that "a pattern of baseless, repetitive claims" may produce the illegal result of "effectively barring respondents from access to the agencies and courts," 404 U.S. at 513, but the opinion contains no mention of any allegations that threats were communicated; the majority's assumption (542 F.2d at 1081) that the Court was referring to such allegations in a passing reference to "other allegations which are too lengthy to quote" (404 U.S. at 511) is pure conjecture.

Trucking Unlimited and *Otter Tail* stand for the proposition that the public interest recognized in *Noerr* in insuring ready access of the citizenry to the decision-making organs of government is not served by sheltering efforts to abuse the processes of government in order to achieve an anticompetitive purpose. Immunizing concerted activity of the sort alleged here, consisting of repeated and baseless opposition to each and every operating permit granted a competitor, accompanied by deception of Board members concerning the sponsors of witnesses before it and possible collusion of certain Board members with the defendants, all as part of a scheme to effectively deny the competitor access to the Board, would thwart rather than advance the *Noerr* interest in insuring everyone a fair opportunity to influence government officials. Such concerted activity carries with it all of the evils of any scheme to eliminate or exclude a competitor, evils which have been deemed serious enough by this Court to justify the *per se* condemnation of such schemes. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Yet the majority below would confer a broad license on unscrupulous businessmen to abuse the processes of government in order to wipe out or exclude a competitor, provided only that they engage in no activity external to the governmental process designed to totally foreclose the competitor from access to the process.

Worse yet, the majority hints at one point that even external activities may be protected if they fail to actually prevent a competitor from invoking the adjudicatory process, for it comments upon the fact that McDonald's was not prevented from applying for permits or having a hearing before the Board. 542 F.2d at 1079. Since it is virtually impossible for a defendant to prevent a competitor from mailing a permit, or setting foot in a courtroom, nothing would be left of *Trucking Unlimited* under the majority's ruling.

Not content to stop there, the majority rules that not only are defendants privileged to abuse the processes of government to achieve an anticompetitive purpose, but their solicitation of governmental action creates an immunity for efforts to directly injure a competitor that are cloaked in the garb of appeals to decision-making bodies. The majority rules that such

efforts do not come under the ban of the *Noerr* sham exception for that exception "is limited to situations where the defendant is not seeking official action by a governmental body. . . ." 542 F.2d at 1081. It is apparently on this basis that the majority dismisses the Company's allegations of a malicious and false publicity campaign accompanied by harassment of customers and the disruption of McDonald's restaurant deliveries.[8] The majority's interpretation of *Noerr* ignores its express language that "[t]here may be situations in which a publicity campaign, *ostensibly directed toward influencing governmental action,* is a mere sham . . .," 365 U.S. at 144 (emphasis supplied), and overlooks the fact that when governmental action is not sought the *Noerr* immunity is not invoked in the first place and there is no need for an "exception" to it. Thus, the majority's interpretation would read the *Noerr* sham exception out of existence.

The majority's ruling is at odds not only with three decisions of this Court, but also with the decisions of Courts in other Circuits. In *Israel v. Baxter Laboratories,* 466 F.2d 272 (D.C. Cir. 1972), the D.C. Circuit sustained the complaint of a drug manufacturer who alleged that defendants had conspired to prevent Food and Drug Administration approval of plaintiff's drug "cothyrobal" by arranging for the FDA to employ

[8]The majority's rejection of these allegations may alternatively be based on its determination that they are accompanied by insufficient detail to satisfy the special pleading standard announced by the Court in the second part of its opinion, *see infra* pp. 22-31. 542 F.2d at 1085.

as a consultant a doctor having a financial interest in defendants, and by misrepresenting the safety and effectiveness of cothyrobal. The Court stated that "[n]o actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278. *See Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971) (alleged conduct of Texas gas producers in filing false market demand forecasts with Texas Railroad Commission, and thereby inducing Commission to reduce production allowances for plaintiffs' wells, not immune from antitrust laws); *Metro Cable Co. v. CATV,* 516 F.2d 220, 228 (7th Cir. 1975) ("When, however, the concerted activities occur in an adjudicatory setting, unethical conduct that would not result in antitrust illegality in a legislative or other nonadjudicatory setting may demonstrate that the defendants' activities are not genuine attempts to use the adjudicative process legitimately and may, therefore, result in illegality, including illegality under the antitrust laws") (dictum); *Semke v. Enid Automobile Dealers Assn.,* 456 F.2d 1361, 1366 (10th Cir. 1972) ("[T]he term 'sham' in this context would appear to mean misuse or corruption of the legal process") (dictum). Thus, this Court, by granting certiorari on this important issue of Sherman Act construction, could put an end to the inconsistencies not only between its prior decisions and the decision of the majority below, but also among the decisions of the various Circuits.

II

The Special Pleading Rule Announced by the Majority for Actions Involving Conduct "Prima Facie Protected by the First Amendment" Is Directly at Odds With Rules 8 and 12 of the Federal Rules of Civil Procedure and an Established Body of Precedent Interpreting Those Rules, and Seriously Undermines the Efficacy of the Private Action as a Weapon Against a Broad Range of Antitrust Offenses and Against Offenses Under Other Regulatory Laws That May Colorably Be Alleged to Inhibit First Amendment Rights.

Even assuming that the substantive rule of law announced by the majority is valid, and that the access-barring conduct condemned in *Trucking Unlimited* must encompass activities external to the adjudicatory process, the Company's general allegations that defendants had acted in concert "to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access" to the Board (App. F, para. 17(a)),[4] accompanied by the allegations that defendants had disseminated false and malicious statements through the news media designed to arouse public wrath against McDonald's, and had disrupted supplies and harassed customers at existing McDonald's restaurants (*id.* para. 17(e)), adequately stated a cause of action under the majority's substantive

[4]These allegations were included in the Proposed Amended Complaint; the majority did not distinguish between the allegations in the original and in the proposed amended complaints for purposes of its holding, which was premised on its conclusion that neither set of allegations stated a cause of action. See n. 2, *supra*.

standard. The majority recognized this, for it stated (542 F.2d at 1082) that

> "[o]rdinarily the conclusory nature of plaintiffs' allegations might warrant greater indulgence, for dismissal of a complaint is normally proper under Rule 12(b)(6) only if 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.' *Conley v. Gibson*, 1957, 355 U.S. 41, 45-46 . . ."

The majority ruled, however, that a special pleading rule must be applied to safeguard the First Amendment right to petition a governmental body:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-83.

The majority does not elaborate on the degree of specificity required by its unprecedented ruling. It is difficult to see how the Company could have added much to its allegations of "consistent, repeated and baseless opposition" to "each and every permit" in the face of the Company's compliance with all applicable regulations; the majority evidently dismisses these allegations on the ground that the conduct involved is not external. More puzzling is the majority's curt rejection (542 F.2d at 1084-85) of the Company's detailed allegations that defendants had engaged in the "dissemination of malicious and false statements

through the news media designed to arouse public wrath against McDonald's," the "harassment of plaintiffs' customers at existing McDonald's restaurants," and "illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants." (App. F, para. 17(e).) Apparently the majority is insisting on the sort of elaborate inventory of names, dates, and places ordinarily reserved for the answers to interrogatories in discovery.

As Judge Browning notes in dissent, 542 F.2d at 1090, the majority cites no authority to support its new rule. That rule flatly contradicts the terms of Rules 8(a), 8(f), and 12(b)(6) of the Federal Rules of Civil Procedure, several decisions of this Court, and innumerable decisions of courts in other circuits. The standard for passing on a motion under Rule 12(b)(6) to dismiss a complaint for failure to state a claim upon which relief can be granted is set forth in Rule 8(a)(2), which states that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." These Rules "restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts. . . ." *Hickman v. Taylor,* 329 U.S. 495, 501 (1947). Under Rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice," pleadings are to be given a liberal reading. *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969); *see Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506 (1959).

In short, the Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). The majority below tacitly conceded (542 F.2d at 1082) that the Company's complaint satisfied these requirements and that its action in dismissing the complaint was a departure from the injunction in *Conley,* 355 U.S. at 45-46, that a complaint should not be dismissed unless no set of facts could be proved which would entitle the plaintiff to relief. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Apart from certain types of actions specifically excepted by Rule 9, there are "no special pleading provisions in the federal rules. The same pleading philosophy controls in every case, regardless of its size, complexity, or the number of parties that may be involved." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1221 at 149 (1969). The liberal pleading philosophy of the Federal Rules has been held to be as applicable to antitrust cases as to any others. *New Home Appliance Center, Inc. v. Thompson,* 250 F.2d 881 (10th Cir. 1957); *Nagler v. Admiral Corp.,* 248 F.2d 319 (2d Cir. 1957); *see* 5 Wright & Miller, *supra,* at § 1228.

More importantly, in two antitrust cases involving precisely the sort of allegations involved here—concerted activity to exclude a competitor by abusing governmental processes—this Court has affirmed the applicability of the liberal pleading standards of the Rules in ruling that lower court dismissal of the com-

plaint was erroneous. In *Trucking Unlimited*, the Court stated that "[w]hat the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion." 404 U.S. at 515. And in *Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 96 S.Ct. 1848 (1976), a case involving alleged concerted activity to delay or prevent the issuance of state authorization for the relocation and expansion of a hospital that would have competed with defendants, this Court relied (96 S.Ct. at 1853) on the precise language in *Conley v. Gibson, supra,* that the majority below declared would "ordinarily" bar dismissal of a generally-worded complaint but was inapplicable here. 542 F.2d at 1082. *See Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279 (D.C. Cir. 1972).

Thus, the majority's holding on the pleading issue promulgates a substantial modification of the Federal Rules of Civil Procedure. The majority's ruling not only disregards a large body of settled precedent, it runs afoul of federal statute. As Judge Browning stated,

> "[T]he power to prescribe general rules of civil procedure for the district courts is vested in the Supreme Court; rules promulgated pursuant to this authority must be reported to Congress before becoming effective. 28 U.S.C. § 2072.
>
> "It is of course necessary that courts interpret and apply the rules in particular cases, but this court has no authority to announce what is in effect a substantial modification of the rules." 542 F.2d at 1090.

The implications of the majority's ruling are exceedingly far-reaching. As Justice Marshall, speaking for

a unanimous Court, stated in *Rex Hospital, supra,* 98 S.Ct. at 1853, ". . . in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators [citations omitted],' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." At a minimum, the majority's rule would virtually insure Sherman Act immunity to those who would injure their competitors by abusing the processes of government, either by using unfair means to procure discriminatory licensing, zoning, tax or other legislative or adjudicatory action, or by imposing upon their competitors the burden of combatting a program of baseless and indiscriminate litigation as in *Otter Tail.* The immunity would derive from the fact that the victim would almost never be able to supply enough factual detail about the defendants' misconduct at the pleading stage to satisfy the majority's standard. Thus, *Trucking Unlimited* and *Otter Tail* would be effectively emasculated.[5]

The majority's formidable pleading requirements are not restricted in their application to plaintiffs alleging conduct of the sort condemned in *Trucking Unlimited,* however; rather, they are imposed whenever a plaintiff seeks relief "for conduct which is prima facie protected by the First Amendment." 542 F.2d at 1083. Given the recently expanded protection afforded commercial speech under the First Amendment, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* .... U.S. ...., 96 S.Ct. 1817 (1976); *Bigelow*

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[5]This would be true even if the majority's substantive standard were rejected; although a plaintiff alleging that he had been the victim of concerted abuse of the governmental process would not have to allege that the abuse was accompanied by conduct external to the process, the nature of the abuse would have to be pleaded in more detail than most plaintiffs could supply at the pleading stage.

v. Virginia, 421 U.S. 808 (1975), and the fact that the conduct proscribed by the antitrust laws often consists largely if not entirely of communication, the scope of the majority's rule may be vast indeed. As Judge Browning observed,

> "*The number of cases within the exception is undoubtedly large, including most antitrust litigation.* '[T]he Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.' [Citation omitted] Thus the crux of an offense under section 1 of the Sherman Act is an agreement or meeting of minds, usually arising out of associations and communication among businessmen." 542 F.2d at 1089. (Emphasis supplied.)

Some hint of the potentially enormous coverage of the majority's pleading rule is contained in the majority's rejection of the Company's allegations of customer harassment and illegal picketing, accompanied by the disruption of deliveries; the majority stated that "[w]e are not told the nature or extent of the picketing, and no specific facts are alleged to indicate that, by virtue of its purpose or manner, the picketing falls outside the traditional protection afforded this activity by the First Amendment." 542 F.2d at 1085. Obviously, the majority's decision would permit defendants charged with conduct bearing only a remote resemblance to the exercise of a First Amendment right to force a preliminary determination by the district

court of whether the conduct alleged is "prima facie" protected by the First Amendment, and thus must be pleaded in special detail. Confronting the private antitrust plaintiff, who already encounters usually lengthy and expensive litigation, with the additional prospect of having to litigate whether conduct is prima facie protected by the First Amendment, and with the likelihood that if the conduct is found to be so protected he will be unable to file a sufficiently detailed complaint, would deal a severe blow to the efficacy of the private action in the enforcement of the antitrust laws. Such a result would flout this Court's repeated pronouncements that the purposes of the antitrust laws are best served by fostering the private action as an ever-present threat to potential violators. *See Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969).

The majority's ruling threatens to undermine not only the enforcement of the antitrust laws, but also the enforcement of other regulatory laws that may colorably be alleged to inhibit the expression of commercial speech or the exercise of other First Amendment rights. Since there is no bright-line test for determining whether conduct is "prima facie protected by the First Amendment," and since the coverage of the First Amendment is undergoing continual evolution, no certain bounds can be placed on the scope of the majority's rule. Certainly the potential range of instances in which defendants may attempt to invoke

the rule's protection, and thus force a preliminary determination of the rule's applicability by the trial court, is breathtaking.

The stupendous costs the majority's pleading rule would exact might be justified if there were no other way to dispose of unwarranted damage actions before trial. But that is not the case. As the Ninth Circuit itself declared in *Harman v. Valley National Bank*, 339 F.2d 564 (1964), a case which won the endorsement of *Trucking Unlimited*, 404 U.S. at 513,

> ". . . a motion to dismiss is not 'the only effective procedural implement for the expeditious handling of legal controversies. Pretrial conference; the discovery procedures; and motions for a more definite statement, judgment on the pleadings and summary judgment, all provide useful tools for the sifting of allegations and the determinations of the legal sufficiency of an asserted claim' short of trial. [Citations omitted]" 339 F.2d at 567. *See* 5 Wright & Miller, *supra*, § 1228 at 170.

Granted, absent the majority's rule an action would often have to proceed into the discovery stage before it could be dismissed for factual insufficiency. But the draftsmen of the Federal Rules made the determination that the burdens this might impose on a defendant are justified in the interest of advancing the overriding goal of deciding cases on their merits, since whether a case has merit often cannot be known until discovery. The majority's ruling is directly at odds with the Federal Rules and the decisions of this Court interpreting

those Rules. The ruling would revolutionize pleading standards, with far-reaching impact on many areas of substantive law, in the service of a policy that is adequately protected by existing pleading standards. Thus, there is an urgent need for review of the ruling, so that it may be defused before some of its more ruinous consequences are felt.

Conclusion.

For the reasons set forth, it is respectfully submitted that a writ of certiorari should issue to review the questions presented herein.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., *Plaintiffs-Appellants,* vs. San Francisco Local Joint Executive Board of Culinary Workers, et al., *Defendants-Appellees.* No. 73-2727.

[September 17, 1976]

On Appeal from the United States District Court for the Northern District of California

Before: BROWNING and DUNIWAY, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

DUNIWAY, Circuit Judge:

Plaintiffs (McDonald's), two subsidiaries of McDonald's Corporation, appeal from a judgment dismissing their first amended complaint without leave to amend, and the action (Rule 12(b)(6), F.R. Civ. P.), and from an order denying their motion, made after the judgment, for leave to file a second amended complaint (Rules 15(a) and 60(b)(6), F.R. Civ. P.). We affirm.

In the first amended complaint, McDonald's alleged that the defendants, two associations of restaurant and hotel employers and a labor union, had combined and conspired, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, to oppose, repeatedly, baselessly and

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*Sitting by designation.

in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants.

McDonald's first amended complaint alleges that in 1971 McDonald's, which operates two restaurants in San Francisco, applied for licenses for the operation of three more restaurants, that permits were granted by the San Francisco Department of Public Works, and that the defendants "persuaded" the San Francisco Board of Permit Appeals to overrule the issuance of the permits and to deny them.

It then continues:

> 17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:
>
> (a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;
>
> (b) That each defendant would solicit the appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;
>
> (c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company.
>
> 18. The conduct described in paragraphs 16 and 17 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Pub-

> lic Works was the product of a combination and conspiracy entered into with the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor. Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.
>
> 19. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with, the Board of Permit Appeals (other than its President), to subvert the constitutional function of

> that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

Nowhere in the complaint does McDonald's tell us, specifically, how or why or even whether the defendants' alleged efforts to influence the Board have in any way impaired McDonald's ability fully to present its views to the Board. Nowhere is it alleged that McDonald's was prevented from applying for permits, or from having a hearing before the Board.

The mere reversal of the grant of the three applications, at the urging of the defendants, suggests no more than "that the plaintiffs and defendants met head-on before the Board and that plaintiffs lost," as the district court noted in its opinion. The complaint fails to adduce any specific facts to support the conclusory allegation that defendants' opposition before the Board was "sham" or "frivolous." This deficiency is hardly surprising, for we seriously doubt that any argument raised before the Board could be so characterized in view of the extremely broad standards governing the exercise of that body's discretion. Under section 3.651 of the Charter of the City and County of San Francisco, the Board would appear to have the authority to deny a permit whenever in its judgment issuance would adversely affect the "interests or property" of any person, or merely "the general public interest."[1]

[1]Section 3.651 provides, in pertinent part:

> *3.651 Functions, Powers and Duties*
>
> . . . [A]ny person who deems that his interests or property or that the general public interest will be adversely affected as a result of operations authorized by or under any permit or license granted or issued by any department may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of the same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused.

The absence of more definite standards suggests that the Board is as much a political as an adjudicatory body. The relatively precise legal standards in light of which certain arguments may be characterized as "frivolous" are simply absent from the rough and tumble of the political arena; almost any position, including the self-interested plea of one competitor that another should be denied a permit, may be urged before such a political body. We find it particularly hard to accept the characterization as "baseless" or "frivolous" of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here.[2]

Be that as it may, the question before us is not whether defendants' arguments were frivolous, but, assuming that they were, whether the defendants opposition, as alleged in the complaint, is a violation of the Sherman Act. We think not.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 1961, 365 U.S. 127, a group of railroads had hired a public relations firm to conduct a two-pronged campaign against competing truckers.

[2]McDonald's might have a remedy in the California courts if the Board improperly reversed the granting of its permits. Nothing in the complaint indicates that it has attempted to obtain such a remedy. We know of no case that holds that joint action which succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act.

One component was a lobbying effort to influence state legislators and executive officers to enact and zealously enforce legislation restricting the trucking industry. The other was a publicity campaign which, according to the truckers, was intended to destroy their general public reputation and the goodwill they had built up with their customers in order to enhance the railroads' share of the long distance freight market.

With respect to the direct lobbying effort, the Supreme Court declared categorically that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint (of trade) or a monopoly. *Id.* at 136.

The Court felt that a contrary construction of the Sherman Act would threaten the First Amendment right of petition, and curtail the flow of valuable information to the government from citizens and groups seeking to influence governmental action. *See* 365 U.S. at 137-38.

For similar reasons, the Court found that the lobbying immunity also encompassed the railroads' publicity campaign, even though the trial court had found that its sole purpose had been to inflict competitive injury and that the tactics employed had been deceptive and unethical:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for

> people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. We . . . hold that, at least insofar as the railroads' campaign was directed towards obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.
>
> * * * *
>
> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. *Id.* at 139-40, 143-44.

In *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, the Court reaffirmed the *Noerr* lobbying immunity and particularly emphasized the irrelevance of the petitioners' underlying motivation:

> *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose. . . . (This holding

is not) permitted by *Noerr* for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* at 670.

The activities of defendants specifically alleged in the complaint before us consist entirely of attempts to lobby and petition a governmental body. Under *Noerr* and *Pennington, supra,* these activities are absolutely immune from antitrust liability.[3]

McDonald's reliance on the *Noerr* "sham exception" is misplaced. That exception does not extend to direct lobbying efforts such as those alleged here, but only to publicity campaigns, which this complaint does not allege. The following is the whole of the *Noerr* opinion's comment on the sham exception:

> There may be situations in which *a publicity campaign,* ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually *nothing more than* an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers'

[3]While *Noerr* and *Pennington* involved attempts to influence legislative and executive action, it is now clear that the same principles govern efforts by citizens or groups to influence administrative and judicial proceedings. *California Motor Transport Co. v. Trucking Unlimited,* 1972, 404 U.S. 508, 510.

> complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case. 365 U.S. at 144 (emphasis added).

Even if the sham exception did apply to direct lobbying efforts, its scope is limited to situations where the defendant is not seeking official action by a governmental body, so that the activities complained of are "nothing more" than an attempt to interfere with the business relationships of a competitor. *See* Handler, *Twenty-Five Years of Antitrust,* 73 Colum. L. Rev. 415, 436. Here it is clear that defendants were seeking and obtained official action from a governmental body, denial of McDonald's permit applications by the Board.

Equally erroneous is the contention that the specific conduct alleged falls within a further exception to *Noerr* created by *California Motor Transport Co. v. Trucking Unlimited,* 1972, 404 U.S. 508. In that case the Court held that a claim for relief was stated by a complaint which alleged that a group of large trucking companies had established a joint trust fund to finance indiscriminate opposition to every application for certificates of public convenience and necessity that smaller competitors filed with state and federal regulatory agencies. But the allegations which both this court and Justice Douglas' majority opinion found "more critical" (404 U.S. at 508) in that complaint—that a well financed campaign to oppose competitors' applications was widely publicized and that express threats of expensive and time-consuming opposition were

communicated to the competitors—have no identifiable analogue in the complaint before us here. In its opinion, the Court said that these allegations "are too lengthy to quote" (*id.*). They are summarized in this court's opinion. *See Trucking Unlimited v. California Motor Transport Co.*, 9 Cir., 1970, 432 F.2d 755, 757, 762. The contrast between those allegations and the allegations in this case is marked. While McDonald's alleges, as did the plaintiffs in *Trucking Unlimited*, that the purpose and effect of the defendants' opposition is "to foreclose the Company from free and unlimited access" to administrative agencies, its complaint is unlike that in *Trucking Unlimited* in that it fails to allege any means by which defendants have achieved, or plan to achieve, their alleged goal of barring McDonald's from access to the Board. There is no allegation that defendants have conducted a publicity campaign, no allegation that their efforts are jointly financed, and, most importantly, no allegation that defendants have by communicating threats sought to deter McDonald's from filing permit applications. The only facts relied on to support the otherwise wholly conclusory access-barring allegation are the appearances of defendants' members and others before the Board and the threats to withdraw political support, on three occasions. Both of these activities are clearly within the direct lobbying immunity recognized by *Noerr*, *Pennington* and *Trucking Unlimited* itself.[4]

[4]"We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *Trucking Unlimited, supra,* 404 U.S. at 510-

Ordinarily the conclusory nature of plaintiffs' allegations might warrant greater indulgence, for dismissal of a complaint is normally proper under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff(s) can prove no set of facts in support of (their) claim which would entitle (them) to relief." *Conley v. Gibson,* 1957, 355 U.S. 41, 45-46; *Corsican Productions v. Pitchess,* 9 Cir., 1964, 338 F.2d 441, 442. But this is not an ordinary case. The Supreme Court has recognized that the right to associate and to petition an administrative agency to take official action in the exercise of its powers is guaranteed by the First Amendment. *Trucking Unlimited, supra,* 404 U.S. at 510-11. Yet McDonald's would have us hold, in effect, that a claim for relief under the Sherman Act is stated by a mere conclusory allegation that this right is being exercised for the purpose of barring a competitor from access to the agency. We decline this invitation because to condition the right to associate and petition on the motivations of the petitioners would have a chilling

11. The qualification of this statement later in Justice Douglas' opinion, *viz.*, that the right to petition, though protected by the First Amendment, does not necessarily confer antitrust immunity on the petitioner (*id.* at 513), must be read in light of *Noerr* and *Pennington* and in light of the facts of *Trucking Unlimited* itself. So considered, we think it plain that this qualification means no more than that defendants who engage in *Noerr*-protected lobbying activities may nevertheless subject themselves to antitrust liability if they engage in activities external to or abusive of the legislative, administrative or judicial process, which activities, like the threats of opposition in *Trucking Unlimited,* tend "to harass and deter . . . competitors from having 'free and unlimited access' to (appropriate) agencies." *See id.* at 515; Handler, *surpa,* 73 Colum. L. Rev. at 436-39; Note *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Administrative Agencies: Analogies to Malicious Prosecution and Abuse of Process,* 86 Harv. L. Rev. 715, 732-35. No allegations that defendants have engaged in any external activities of this type appear in McDonald's complaint.

effect on exercise of this fundamental First Amendment right, and such a ruling would in a practical sense render the *Trucking Unlimited* exception coextensive with the *Noerr* immunity.

Regardless of what the actual facts might be, what plaintiff interested in deterring his competitors' opposition before a governmental body would fail to recite in its complaint the conclusory "access-barring" incantation? And what competititor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation, which would drag on through the discovery stage at least, would not thereby feel pressured to forego presenting its views to the government? Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive. When this well known fact is combined with the large damages usually claimed (here at $11,-100,000.00) and sometimes awarded, an action like this one can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights.

The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. *See, e.g., Time, Inc. v. Hill,* 1967, 385 U.S. 374, 387-91; *New York Times Co. v. Sullivan,* 1964, 376 U.S. 254, 267-83; *N.A.A.C.P. v. Button,* 1963, 371 U.S. 415, 431-33. Because we think that similar values are endangered in this case, we hold that in order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr,* which plaintiffs contend have barred their access to a governmental body. The deficiencies

of McDonald's amended complaint in this regard are evident from what we have said above. Dismissal of that complaint was proper.

In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called "fact" pleading, as distinguished from "notice" pleading, is required in antitrust cases. We repudiated that notion in *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 9 Cir., 1963, 323 F.2d 1, 3-4. What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

It is no answer to say that there are better ways in which the defendants can show the lack of merit of the action. Reference is usually made to a motion for summary judgment. But this is not an answer in most cases. We are told that the motion is usually inappropriate in complex cases. *Poller v. Columbia Broadcasting Co.,* 1962, 368 U.S. 464, 473. Moreover, it takes little to establish a conflict of evidence as to a material fact. And if the defendants, by affidavits fully conforming to the rule, show that the case is without merit, and if fear of perjury (a rather uncommon fear among the makers of affidavits) prevents the filing of directly contradictory affidavits, Rule 56 still gives the plaintiffs an escape hatch. They can claim that they won't know the facts until they have had discovery and get action on the motion postponed. Moreover, the sanctions of Rule 56(g) are invoked

with "extreme infrequency." *See Alart Associates, Inc. v. Aptaker,* 2 Cir., 1968, 402 F.2d 779, 780.

The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case. The decision in *Blue Chip Stamps v. Manor Drug Stores,* 1975, 421 U.S. 723, an action based on § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC, recognizes this fact and is to be a considerable extent based upon it:

> There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. This fact was recognized by Judge Browning in his opinion for the majority of the Court of Appeals in this case, 492 F.2d, at 141, and by Judge Hufstedler in her dissenting opinion when she said:
>
> The purchaser-seller rule has maintained the balance built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market. *Id.* at 147
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> * * * *

We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. These concerns have two largely separate grounds.

The first of these concerns is that in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

* * * *

The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the

> many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

There are many cases in which, if the right to petition protected under the First Amendment is to have value, it must be exercised without delay. This is such a case. If the defendants did not appear at the Board's scheduled hearing, their right to petition would be lost. If this action were still pending below, that fact might have caused them not to appear at another hearing. The dangers that the Court saw in *Blue Chip* are also visible here.

Otter Tail Power Co. v. United States, 1973, 410 U.S. 366, cited by plaintiffs, is not germane to the issue before us. In that case the district court had held that the *Noerr* immunity was inapplicable to the instigation of judicial proceedings. *United States v. Otter Tail Power Co.*, D. Minn., 1971, 331 F. Supp. 54, 62. One paragraph of the Supreme Court's opinion, 410 U.S. 379-80, remanded the immunity issue for reconsideration in light of the intervening *Trucking Unlimited* decision, which recognized that *Noerr* did apply to judicial proceedings. *See* 404 U.S. at 510. That paragraph obviously cannot be read, as McDonald's would have us read it, as a holding that the *Otter Tail* facts fall within the *Trucking Unlimited* exception. But even if the Supreme Court had so held, as the district court did on remand (D. Minn., 1973, 360

F. Supp. 451), the facts in *Otter Tail* are no more similar to those in our case than are the facts in *Trucking Unlimited.* As in *Trucking Unlimited,* the complaint in *Otter Tail* alleged that the defendant had threatened potential competitors—municipalities seeking to take over electric power facilities then operated by the defendant—with instigation of baseless proceedings—litigation which had the effect of delaying and increasing the expense of sale of municipal securities necessary to finance the takeover. The defendant allegedly hoped that the added expense and delay would force the municipalities to abandon their takeover plans and renew their power contracts with the defendant. Thus, the gravamen of the government's case in *Otter Tail* was not defendant's instigation of the litigation, a right guaranteed by the First Amendment, *see Trucking Unlimited, supra,* 404 U.S. at 510, but the fact that the defendant had used the threat of litigation as a bludgeon in its attempts to retain its monopoly in the regional electric power market.

In one respect *Otter Tail* is a "through the looking glass" version of the case at bar. In that case, whenever a community sought to go into the power business, Otter Tail sued. The effect of the mere filing of the action destroyed the community's ability to proceed. Nobody would buy its bonds while the action was pending. Mere filing was enough to accomplish Otter Tail's purpose. In our case, that is not so. Mere opposition would not defeat McDonald's purpose; to do that, defendants had to persuade the Board to rule in their favor—and it is alleged that they succeeded. The only bit of *in terrorem* litigation here is McDonald's action, an avowed purpose of which is to eliminate opposition,

even the defendants' successful opposition, to its desires before the Board.

The proposed second amended complaint, submitted to the district court in conjunction with McDonald's motion to set aside the judgment and for leave to file the complaint, adds little but adjectives to the first amended complaint.[5] The new complaint alleges

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[5]Paragraphs 18 and 19 of the second amended complaint are virtually identical to paragraphs 18 and 19 of the first amended complaint. Paragraph 17 of the new complaint is as follows:

"The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:

"(a) Motivated by an intent to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access to the Department of Public Works and the Board of Permit Appeals, the defendants would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) The defendants would secretly solicit the appearance before the Board of such of its members and other persons as it could secure to support its opposition to issuance of each such permit and that such other persons, while purportedly acting on behalf of themselves in said appearances, were acting on behalf of the defendants, which fact was not revealed to the Board;

(c) That all or substantially all of the persons who made an appearance before the Board in opposition to plaintiffs were members of defendants or were secretly solicited by defendants;

(d) That the defendants would threaten lack of political support to such Board members and other city officials who supported plaintiffs as were necessary;

(e) That defendants would engage in massive concerted action which was designed to engender public wrath against plaintiffs and which included, *inter alia*, the following activities:

(This footnote is continued on next page)

that defendants have sponsored two other administrative proceedings against McDonald's. This activity falls squarely within the protection of the *Noerr* immunity. The new complaint also alleges that defendants have made false and malicious statements to the news media for the purpose of engendering public wrath against McDonald's. But the nature of the statements is not disclosed, and nothing specifically alleged indicates that the statements were not genuinely intended to influence governmental action, like the publicity campaign held immune in *Noerr*. Finally, it is now alleged for the first time that the defendants have picketed existing McDonald's restaurants, interfering with deliveries and harassing customers. Like McDonald's other allegations, this one also is wholly conclusory. We are not told the nature or extent of the picketing, and no specific facts are alleged to indicate that, by virtue of its purpose or manner, the picketing falls outside the traditional protection afforded this activity by the First Amendment. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 1968, 391 U.S. 308, 313-14.

(i) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the Human Rights Commission;

(ii) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the California Division of Labor Law Enforcement concerning business practices of McDonald's;

(iii) The dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's;

(iv) Harassment of plaintiffs' customers at existing McDonald's restaurants; and

(v) Illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants."

The denial of either a motion under Rule 60(b)(6) or a motion for leave to amend may not be disturbed on appeal absent an abuse of the district court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1971, 401 U.S. 321, 330; *Komie v. Buehler Corp.*, 9 Cir., 1971, 449 F.2d 644, 647; *Vickery v. Fisher Governor Co.*, 9 Cir., 1969, 417 F.2d 466, 470; 3 Moore, Federal Practice ¶ 15.08(4). Because we agree with the district court that the additional material in the proposed second amended complaint adds little to the allegations of the first amended complaint, and because the second amended complaint would thus be subject to a motion to dismiss if filed, we cannot say that withholding leave to amend was an abuse of discretion. *See Vickery v. Fisher Governor Co., supra; DeLoach v. Woodley*, 5 Cir., 1968, 405 F.2d 496; *cf. Duggan v. International Association of Machinists*, 9 Cir., January 24, 1975, No. 73-1870.

In summary, we hold that the complaint charges nothing more than an agreement by the defendants to do that which, under *Noerr-Pennington*, they had a right to do. This action is in essence, an improper attempt to chill, indeed to prevent, the exercise of First Amendment rights. It was properly nipped in the bud by the trial judge.

Affirmed.

MARKEY, Chief Judge, United States Court of Customs and Patent Appeals (Concurring):

I concur in the excellent opinion of Judge Duniway. The presence of Judge Browning's strong and scholarly dissent, particularly its clear and forceful exposition of pleading considerations, prompts these few remarks.

I cannot find an allegation that defendants "did foreclose" free and unlimited access. Paragraph 18 alleges the defendants' opposition was a coverup of a "plan" to foreclose. Moreover, it would appear that McDonald's could not allege such foreclosure. It had full access. Whatever "free and unlimited" may mean, it cannot, in my view, require *successful* access or access *unopposed*. Nothing of record indicates that McDonald's feared defendants' opposition or that its freedom and ability to seek future permits was in any manner "chilled" by the expected opposition of defendants. On the contrary, as Judge Duniway's opinion makes plain, the present suit for $11,000,000 has an inherent chill factor with respect to defendants' freedom to oppose future permits.

In any event, the case illustrates, in my view, an effect of the unhappy marriage of "notice" pleading and virtually unlimited discovery.* The "might makes right" potential in that combination is, of course, completely contrary to the intent behind the effort to free the pre-trial phase from formalism and surprise.

In today's litigious milieu, a reversal based on rigid adherence to the Federal Rules of Civil Procedure herein is not likely to have a shock value sufficient to force reform. However that may be, I believe such an attractively conservative approach should await an instance in which the exercise of First Amendment rights of speech, association, and petition would not, as here, be so clearly impeded.

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*See National Conference of the Causes of Popular Dissatisfaction with the Administration of Justice, 70 *Federal Rules Decisions* 79 (1976).

BROWNING, Circuit Judge, dissenting:

As the majority succinctly puts it, McDonald's alleged that defendants combined "to oppose, repeatedly, baselessly and in bad faith, the granting of building permits by the San Francisco Board of Permit Appeals (Board) for the construction of McDonald's restaurants." McDonald's also alleged that defendants, by their repeated and baseless opposition to every McDonald's application, intended to and did foreclose McDonald's from "free and unlimited access" to the Board and "thereby interfere[d] directly with the business activities and relationships of a competitor." Complaint, paragraph 18.

These allegations, together with averments of anticompetitive purposes and effect, state an antitrust claim under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972): "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established." *Id.* at 515.

The majority finds this result unpalatable, and, to avoid it, distorts the substantive rule announced in *Trucking Unlimited* and applied in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974). The majority also creates an unwarranted exception to the standard for pleading laid down in the Federal Rules of Civil Procedure and forcefully restated in *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

I

The majority assumes, though reluctantly, that defendants opposed the granting of building permits to McDonald's repeatedly, baselessly, and in bad faith, as alleged, and holds that, though deceptive, unethical, and undertaken to impose competitive injury, such conduct is immunized from the Sherman Act because it involves only the exercise of the First Amendment right of petition. The majority asserts that *Trucking Unlimited* applies only to defendants who have engaged in activities "external" to the administrative or judicial process (majority opinion note 4); and distinguishes *Otter Tail* on the ground that there the "gravamen" of the government's case was conduct by the defendants other than the instigation of litigation, a right guaranteed by the First Amendment. The majority's premise is that the Sherman Act cannot be violated by the exercise, in any manner or with any intent, of the First Amendment right to petition an administrative or judicial tribunal; some additional conduct is required, external to the proceedings before the tribunal.

Not only does the majority cite no authority for this rule, but *Trucking Unlimited* and *Otter Tail* are exactly to the contrary.

Trucking Unlimited holds as clearly as language can put it that the fact that defendants' conduct is protected by the First Amendment does not necessarily give them immunity under the antitrust laws, and that Sherman Act liability may be based upon no more than an abuse of the defendants' own First Amendment right of access to an administrative tribunal. *California Motor Transport Co. v. Trucking Unlimited, supra*, 404 U.S. at 413-15. The Court expressly holds that institution of baseless, repetitive claims, although an

exercise of the First Amendment right of petition, is an abuse of the administrative or judicial process that may evidence an intention to eliminate competition by barring competitors from meaningful access to adjudicatory tribunals, and thus violate the Sherman Act. *Id.* at 512-13, 515. The complaint in this case alleges precisely what *Trucking Unlimited* holds to be an antitrust violation. If there were any doubt as to the majority's meaning in *Trucking Unlimited,* it would be dispelled by the opinion of Justice Stewart who, with Justice Brennan, concurred in the judgment but declined to join the majority opinion specifically because the majority held that Sherman Act liability may be based upon the manner in which defendants exercise their First Amendment right of access to an adjudicatory tribunal. *Id.* at 517.[1]

In the *Otter Tail* litigation, the Supreme Court reaffirmed the doctrine that repetitious institution of proceedings before an adjudicatory tribunal may violate the Sherman Act if it reflects an intention to restrain competition by denying competitors meaningful access to the tribunal.

The case was before the Supreme Court twice. On the first occasion, as the majority notes, the Supreme Court simply remanded for reconsideration in light of *Trucking Unlimited.* In doing so, however, the Court stated without qualification that *Trucking Unlimited*

[1]The complaint alleges that the Board's function is adjudicatory. The majority suggests that it may in fact be legislative. The distinction is critical. *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972). *See also* Rodgers v. FTC., 492 F.2d 228, 232 n.3 (9th Cir. 1974). The question cannot be resolved on the present record. The majority assumes, as it must, that the Board is an adjudicatory body.

had held that the Sherman Act "may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims . . . ." *Otter Tail Power Co. v. United States, supra,* 410 U.S. at 380. This language contains no suggestion that conduct external to the litigation itself is also required to make out an antitrust violation.

The majority asserts that the Supreme Court's decision on the first appeal in the *Otter Tail* litigation is not a holding that the facts established an antitrust violation. This is literally true. It is also misleading. On remand, the district court held that the facts did make out a violation of the Sherman Act.[2] The defendant again appeal. In a second decision, not mentioned by the majority, the Supreme Court affirmed this holding. *Otter Tail Power Co. v. United States,* 417 U.S. 901 (1974).

The majority contends that *Otter Tail* involved not only actual litigation, but also threats of litigation, and thus satisfied the majority's dictum that conduct external to the exercise of the First Amendment right must be involved to forfeit antitrust immunity. Nothing in any of the opinions in the *Otter Tail* litigation suggests that the result reached depended upon the fact that threats were used. The opinions refer only

[2]On remand the district court found as follows:

> I find that the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly. I find the litigation comes within the sham exception to the *Noerr* doctrine as defined by the Supreme Court in *California Transport* . . . .

United States v. Otter Tail Power Co., 360 F. Supp. 451, 451-52 (D. Minn. 1973).

to a pattern of unsubstantial litigation employed to maintain a monopoly. An examination of the briefs filed in the Supreme Court for both appeals demonstrates that this was the crux of the charge. The government neither alleged nor proved that defendant employed threats of litigation as a planned part of defendant's program to maintain its monopoly, and the district court made no such finding.[3]

The defendants in *Trucking Unlimited* and *Otter Tail* did not lose antitrust immunity because they did anything in addition to participating in administrative and judicial processes. Immunity was lost because the defendants abused those processes by a pattern of conduct designed to eliminate competition by harassing and deterring competitors in their use of such processes and thus deny them meaningful access to such processes.

To repeat, there is no authority to support the majority's holding that abuse of administrative proceedings, although accompanied by the requisite intent, cannot alone constitute a violation of the Sherman Act; and *Trucking Unlimited* and *Otter Tail* hold to the contrary.[4]

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[3]The only reference to threatened litigation in the briefs submitted to the Supreme Court in the first *Otter Tail* appeal is found in a footnote in the Statement of Facts of the government's brief, in which two incidents that might be interpreted as involving such threats are described. Brief for the United States at 27 n.23. The same summary appears as footnote 9 at pages 11-12 of the Statement of Facts in the government's Motion to Affirm on the second appeal. It is frivolous to suggest that these incidental and ambiguous references formed the basis of the Court's ruling.

[4]It was unnecessary for appellants to allege that they were in fact foreclosed from access to the Board. It was neither alleged in the complaint in *Trucking Unlimited* nor proven in the trial in *Otter Tail* that the ability of competitors to present their views was actually foreclosed or that competitors were either prevented from filing applications with the tribunal or from obtaining a hearing. It is enough to allege a denial of meaningful access.

It was also unnecessary for appellants to allege that the defendants' submissions were baseless or that defendants did not seek favorable action by the adjudicatory body. The complaint in *Trucking Unlimited* "did not allege that the presentations defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support," and the district court held that the "sham" exception was inapplicable for this very reason. Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 762 (9th Cir. 1970). The antitrust defendants in both *Trucking Unlimited* and *Otter Tail* sought the favorable action of the tribunal when and if they could get it. The *Trucking Unlimited* complaint alleged that the antitrust defendants "instituted the proceedings and actions . . . *with* or without probable cause, and *regardless of the merits* of the cases." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972) (emphasis added). "Under this approach, the abusiveness of the petitioning practices is the key. The fact that in engaging in these practices the petitioner is actively seeking to influence the government decision-making is irrelevant." Note, Antitrust and the Constitution, 42 U. Cinn. L. Rev. 281, 304 (1973). As the court said in Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361, 1366 (10th Cir. 1972), "Thus, the term 'sham' in this context would appear to mean misuse or corruption of the legal process." *See also* Rodgers v. FTC, 492 F.2d 228, 232 n.3 (9th Cir. 1974).

Even if it were relevant, the majority's assertion that "it is clear" that defendants were seeking official action is an unwarranted and premature factual determination. The district court made no such finding and there is no record to support it. As the Chief Justice warned in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974):

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

II

The second rule announced by the majority is procedural. "What we do hold," the majority states, "is

that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."

Until the majority spoke, no complaint was subject to dismissal under Rule 12(b)(6) unless it failed to meet the liberal pleading standard of Rule 8(a). 5 C. Wright & A. Miller, Federal Practice & Procedure § 1356, at 590 (1969); *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley v. Gibson, supra,* 355 U.S. at 45-46; *Bodine Produce, Inc. v. United Farm Workers Organizing Committee,* 494 F.2d 541, 556 (9th Cir. 1974). This standard was applicable to all actions in federal courts, except those identified in Rule 9(b). 5 C. Wright & A. Miller, *supra,* § 1221, at 149. "[T]he rules reject the notion that certain actions inherently carry a different pleading burden than others." *Id.* at 151. Rule 9(b) requires greater particularity only in alleging fraud; and this exception to the general rule of notice pleading was to be "construed narrowly and not extended to other legal theories or defenses." 5 C. Wright & A. Miller, *supra,* § 1297, at 405.

The majority's exception to the general rule would apply to any case involving "conduct which is prima facie protected by the First Amendment." The number of cases within the exception is undoubtedly large, including most antitrust litigation. "The Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of

conspiring a condition of liability." *Nash v. United States,* 229 U.S. 373, 378 (1913). Thus the crux of an offense under section 1 of the Sherman Act is an agreement or meeting of minds, usually arising out of associations and communication among businessmen. *See Giboney v. Empire Storage Co.,* 336 U.S. 490, 502 (1949); *quoted in California Motor Transport Co. v. Trucking Unlimited, supra,* 404 U.S. at 514. Yet we have recognized that no special rules apply to the pleading of antitrust cases and have specifically rejected the notion that it is necessary to plead "facts" rather than "conclusions" in such cases.[5] *Walker v. Lucky Lager Brewing Co.,* 323 F.2d 1, 3-4 (9th Cir. 1963); *see Nagler v. Admiral Corp.,* 248 F.2d 319, 322-23 (2d Cir. 1957); 5 C. Wright & A. Miller, *supra,* § 1228, at 167.

The majority cites no authority to support its new rule. Three cases are referred to for the general proposition that the Supreme Court has "recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees."[6] But none of these is a pleading case, and none suggest that the problem of protect-

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[5]The Supreme Court recently reversed the dismissal of an antitrust complaint for failure to state a claim upon which relief could be granted because the "concededly rigour standard" for such a dismissal was not met. Justice Marshall, speaking for a unanimous Court, explained that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Bldg. Co. v. Trustees of the Rex Hospital, 98 S.Ct. 1848, 1853 (1976).

[6]Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and NAACP v. Button, 371 U.S. 415 (1963).

ing First Amendment rights from the chilling effect of harassing litigation should be solved by the creation of a judicial exception to the federal rules of pleading.

The majority quotes the discussion in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975), of the danger of vexatious litigation under Rule 10b-5, particularly because of the potential for abuse of the discovery provisions of the Federal Rules of Civil Procedure in this type of case. But again, the Supreme Court's opinion offers no support for the creation by judicial fiat of an exception to the Federal Rules of Civil Procedure as a means of dealing with the problem.

The power to prescribe general rules of civil procedure for the district courts is vested in the Supreme Court; rules promulgated pursuant to this authority must be reported to Congress before becoming effective. 28 U.S.C. § 2072.

It is of course necessary that courts interpret and apply the rules in particular cases; but this court has no authority to announce what is in effect a substantial modification of the rules.

APPENDIX B.

Memorandum of Opinion.

In the United States District Court, for the Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, et al., Defendants. No. C-73-0012 SW.

Plaintiffs Franchise Realty Interstate Corporation and McDonald's System of California, Inc., operate and license restaurants specializing in the sale of hamburgers. Defendants are the San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers (Joint Board), the Golden Gate Restaurant Association, and the Hotel Employers Association of San Francisco.

While the parties would characterize this dispute as part of a life or death contest between free enterprise and collective bargaining, the facts material to these motions are as follows: Plaintiffs secured approval by the San Francisco Department of Public Works for construction of restaurants at three locations in San Francisco. The Department's decision was appealed to the Board of Permit Appeals by persons other than the defendants. Defendants appeared at the Board's public hearings and spoke against the permits. The content of defendants' arguments before the board is not made clear by the papers and it is not alleged that defendants were the sole opponents to the permits at the conclusion of the hearings. The Board reversed

the Department's approvals and withdrew the certifications.

Plaintiffs then instituted the present action alleging that defendants' efforts to influence the Board's decision constituted a conspiracy to restrain trade and commerce in violation of Section 1 of the Sherman Act. (15 U.S.C. § 1).

Defendants move severally for dismissal. Each argues that the acts they are alleged to have performed are protected under the First Amendment and the complaint thus fails to state a claim upon which relief can be granted, and that the court lacks jurisdiction to hear the cause because the complaint fails to allege acts constituting interstate commerce. The Joint Board argues, additionally, that as labor organizations its members are exempt from antitrust liability under *United States v. Hutcheson,* 312 U.S. 219 (1941) and related cases. Because resolution of the first issue is dispositive of these motions it is unnecessary to consider the latter two.

Defendants' alleged wrongful acts are set forth in their entirety in Paragraphs 16 and 17 of the amended complaint, which reads:

> "16. Beginning in or about early 1972, . . . and continuing thereafter up to and including the date of this complaint, defendants have combined and conspired to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act. . . .
>
> "17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:
>
> (a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;
>
> (b) That each defendant would solicit appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;
>
> (c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company."

In the opinion of this court these allegations constitute a textbook example of the type of activities protected by the First Amendment from antitrust liability. In *Eastern Railroad Conference v. Noerr Motors,* 365 U.S. 127 (1960), defendant, an association of railroads, was alleged to have clandestinely sponsored a comprehensive publicity campaign in support of laws unfavorable to the trucking industry with the sole purpose of reducing competition and restraining trade. The complaint sought specific damages for the truckers' loss of revenue due to the veto by the Governor of Illinois of the "Fair Trucking Bill" (which would have permitted trucks to haul heavier loads on public highways), for general damages, and for an injunction restraining defendants from disseminating any disparaging information about the truckers through third parties without disclosing defendants' sponsorship. Defend-

ants counterclaimed, alleging substantially identical activity on the part of the plaintiffs and seeking the same relief. The district court found that the information distributed by defendants' agent have been maliciously conceived distortions of fact. General damages were awarded and the broad injunctive relief sought was granted. The Court of Appeals affirmed the judgment. In a unanimous opinion the Supreme Court reversed, holding that:

> "We think it . . . clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] . . . in restraint of trade', they bear very little if any resemblance to the combinations normally held violative of the Sherman Act. . . ." 365 U.S. at 136.

If there is a difference between *Noerr* and the present case it is that the complaint here alleges acts less reprehensible than those which the Supreme Court there held immune from antitrust liability. In this case, as opposed to *Noerr*, the acts complained of are confined solely to influencing a single governmental agency. No widespread campaign to turn public wrath against McDonald's is alleged, nor does the complaint allege that defendants' arguments before the Board were based on ". . . distortion . . ., [the] manufacture of bogus sources of reference [or] distortion of public sources of information" as was the case in *Noerr*. *Id.* at 140.

Lastly, defendants here made no attempt to employ the third party technique to influence the Board, but made it quite clear who they were and what they wanted.

The *Noerr* principle was reaffirmed in *Mine Workers of America v. Pennington*, 381 U.S. 657 (1964). In that case the Court held that counterclaim defendants' successful solicitation of minimum wage regulations from the Secretary of Labor as part of their alleged overall conspiracy to drive counterclaimant to ruin was protected by the First Amendment.

Plaintiffs attempt to distinguish *Noerr* and *Pennington* on the theory that defendants' activities before the Board fall into the "sham" exception to the immunity as enunciated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971) and *Otter Tail Power Co. v. United States*, 41 U.S.L.W. 4292 (February 22, 1973). The facts alleged here, however, even when read most favorably to the plaintiff, cannot be stretched to accommodate that theory. In *Trucking Unlimited* the parties were competitors in the trucking industry. The lengthy complaint alleged specific facts which indicated defendants

> ". . . [used their] power, strategy and resources . . . to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became 'the regulators of the grants of rights, transfers and registrations' to respondents—thereby depleting and diminishing the value

of the businesses of respondents and aggrandizing petitioners' economic and monopoly power." 404 U.S. at 511.

The Court held that the complaint stated a claim because it sufficiently alleged a sham on the part of the defendants and therefore fell outside the *Noerr-Pennington* doctrine. The distinction the court drew between the two factual situations is found on pages 511 and 512 of the report:

> "In the present case . . . the allegations are not that the conspirators sought 'to influence public officials,' but that they sought to *bar their competitors from meaningful access to adjudicatory tribunals* and so *usurp* that decisionmaking process. It is alleged that petitioners '*instituted* the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful *access* to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception in *Noerr*." (Emphasis added).

The Court then cited a number of examples of sham activity such as conspiring *with* a licensing authority to eliminate a competitor, bribing a public official, filing a series of baseless, repetitive claims against a competitor (404 U.S. at 512-513), and concluded

that while the line between sham and bona fide exercise of First Amendment rights ". . . may be difficult to discern and draw, once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz., effectively barring respondents from access to the agencies and courts.*" *Id.* at 513 (emphasis added).

The present complaint does not allege that defendants abused or circumvented the proceedings before the Board of Appeals; it does not allege defendants exercised any unlawful or extrinsic power over the Board or its members to gain a favorable decision. Nor does it allege any attempt (let alone a "concerted and massive" one) to block plaintiffs' access to the Board. The complaint alleges that plaintiffs and defendants met head-on before the Board and that plaintiffs lost.

Plaintiffs appear to confuse the sham exception to the *Noerr* doctrine with malicious or selfish intent on the part of the defendant. But *Noerr* and its progeny make clear that intent is irrelevant with respect to the immunity:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." 365 U.S. at 139.

That proposition was amplified in Pennington.

> "Joint efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition*. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. (Emphasis added).

Otter Tail Power Co. v. United States, supra, cited by plaintiffs, adds little to the *Noerr* principle or the *California Trucking* sham exception, and nothing, in the opinion of the court, to plaintiffs' case here.

This complaint, reduced to its essence, states that plaintiffs wished to build restaurants in San Francisco, that the Board of Permit Appeals denied the permits notwithstanding their ability to comply with all laws, codes, ordinances and regulations of the City and County of San Francisco, and that the Board's decision was influenced by defendants' open opposition. It is apparent that if plaintiffs have been wronged they have been wronged by the Board of Permit Appeals; and that their remedy lies in the State courts and not by way of anti-trust relief in the federal court.

Accordingly, defendants' motions for dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure, should be and hereby are GRANTED.

DATED: May 8, 1973.

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Supplemental Order.

In the United States District Court for the Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, et al., Defendants. No. C-73-0012 SW.

The motion of Plaintiffs Franchise Realty Interstate Corporation and McDonald's System of California, Inc. to set aside judgment and for leave to file second amended complaint was regularly heard on June 1, 1973. Blecher & Collins, by Maxwell M. Blecher, appeared as attorneys for Plaintiffs. Davis, Cowell and Bowe, by Alan C. Davis, appeared as attorneys for Defendant San Francisco Local Joint Executive Board. Rubenstein and Hawkins, by Michael Rubenstein, appeared as attorneys for Defendant Golden Gate Restaurant Association, and Steinhart, Goldberg, Feigenbaum & Ladar, by Neil Falconer, appeared as attorneys for Hotel Employers Association of San Francisco. The matter having been fully briefed and argued by the parties and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that said motion should be and herein is denied.

Dated: June ....., 1973.

Spencer Williams
United States District Judge

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., Plaintiffs-Appellants, vs. San Francisco Local Joint Executive Board of Culinary Workers, et al., Defendants-Appellees. No. 73-2727.

Filed: November 2, 1976.

Before: BROWNING and DUNIWAY, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Sitting by designation.

APPENDIX E.

Complaint for Damages and Injunctive Relief.

United States District Court, Northern District of California.

Franchise Realty Interstate Corporation and McDonald's System of California, Inc., Plaintiffs, v. San Francisco Local Joint Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, Golden Gate Restaurant Association and Hotel Employers Association, Defendants. No. C-73-0012 SW.

Filed Jan. 3, 1973.

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC., plaintiffs herein, bring this action for damages and injunctive relief, and complain and allege as follows:

I

JURISDICTION AND VENUE

1. This claim is filed and these proceedings instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover damages based on, and secure injunctive relief against, violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act, as amended, (15 U.S.C. 1).

2. Defendants inhabit, maintain offices, transact business and may be found within the Northern District of California. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in part within the Northern District of California. Defendants are within the jurisdiction of this Court for purposes of service of process.

II
THE PARTIES

3. FRANCHISE REALTY INTERSTATE CORPORATION (hereinafter FRIC) and McDONALD'S SYSTEMS OF CALIFORNIA, INC., are the plaintiffs herein. FRIC is a corporation organized and existing under the laws of the State of Illinois with its principal place of business in Oak Brook, Illinois. FRIC is a wholly owned subsidiary of McDonald's Corporation, also of Oak Brook, Illinois, whose subsidiaries operate family style restaurants under the name of McDonald's and license others to operate such restaurants throughout the United States (these company operated and licensed restaurants are hereinafter sometimes collectively referred to as "McDonald's restaurants"). FRIC is the corporate subsidiary through whom McDonald's Corporation secures sites on which such restaurants are built. Plaintiff, McDonald's Systems of California, Inc., is also a wholly owned subsidiary of McDonald's Corporation and an affiliate of FRIC (McDonald's Corporation, FRIC and McDonald's Systems of California, Inc. are sometimes hereafter referred to jointly as "the Company").

4. SAN FRANCISCO LOCAL JOINT BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS (hereinafter Joint Board) is hereby named a defendant herein. The Joint Board is an association of labor organizations, the members of which are employed in connection with the operation of restaurants, bars, hotels and motels and clubs. Joseph Belardi is the Executive Secretary of the Joint Board and acts as its spokesman.

5. GOLDEN GATE RESTAURANT ASSOCIATION AND HOTEL EMPLOYERS ASSOCIATION (hereinafter GGRA) is named a defendant herein. GGRA is a trade association composed of about two hundred fifty (250) restaurants and hotels which concerns itself, *inter alia*, with negotiating labor contracts with defendant Joint Board.

III
NATURE OF TRADE AND COMMERCE

6. Specializing in hamburgers, but offering other foods as well, McDonald's restaurants provide a clean atmosphere, serve no liquor, have no cigarette vending machines, and create an environment suitable to family dining. McDonald's restaurants have achieved a position of preeminence in the restaurant business while generally charging prices substantially less than most of the restaurants with which they compete. Still, the Company and its independent licensees have provided, in the past, and today continue to provide, food of the highest quality. This combination of high quality food at low prices in a friendly, clean, family atmosphere has contributed to an ever increasing demand for McDonald's products and locations.

7. Students who are, in many instances, members of minority races and ethnic groups are employed at substantially all McDonald's restaurants and thereby provided with an opportunity to complete or extend their education. The Company has found this program to be good for itself and good for these employees. Moreover, having young men and women serve has been widely accepted by the patrons of McDonald's restaurants.

8. Employees of McDonald's restaurants are not members of a labor union. As many of these employees are students who work only part time, they earn less than full time, labor union restaurant employees.

9. As the business of McDonald's restaurants continues to grow, and as they continue to serve high quality food at low prices in congenial family surroundings, competing restaurants, including many in San Francisco, have evidenced increasing concern about their inability to effectively compete with McDonald's restaurants.

10. The Company now operates two restaurants in San Francisco, California, one being at 1201 Ocean Avenue and the other at 1041 Market Street. These restaurants successfully compete with a wide variety of restaurants, cafeterias, hofbraus, etc., by using the format described above.

11. During the year 1971 the Company has applied for licenses within the City and County of San Francisco for the operation of restaurants at the following three locations:

(a) 1979 Mission Street

(b) 2299 Chestnut Street

(c) California & Hyde Streets

12. On each occasion the required permits have been approved by Department of Public Works, City and County of San Francisco certifying that in each instance the proposed restaurant would comply with all of the laws, codes, ordinances and regulations of the City and County of San Francisco.

13. In each instance, on the basis of the conduct hereinafter described to be unlawful and for the anti-

competitive purposes hereinafter described, the defendants, acting directly through their spokesman or through individual members have induced and persuaded the Board of Permit Appeals of the City and County of San Francisco to overrule the issuance of the permit and to deny to the Company the right to build and operate or license restaurants in each of the aforementioned locations.

14. The conduct of McDonald's restaurants involves the purchase of goods and commodities outside the State of California and the shipment of those goods and commodities into the State of California. The aforementioned restraints, described more fully hereinafter, have operated directly to prevent the movement of goods and commodities in interstate commerce and unless restrained by this Court will continue so to do. The combination and conspiracy, described hereinafter, has, therefore, directly and substantially, restrained and affected the flow of goods and commodities in interstate commerce.

IV

OFFENSE ALLEGED

15. Beginning in or about early 1972, the precise date being to plaintiffs unknown, and continuing thereafter up to and including the date of this complaint, defendants have combined and conspired to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

16. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action, the substantial terms of which have been and are:

(a) That each defendant would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) That each defendant would solicit the appearance before the Board of such of its members and others as it could secure to support its opposition to issuance of each such permit;

(c) That each defendant would threaten lack of political support to each Board member and other city officials who supported the Company.

17. The conduct described in paragraphs 15 and 16 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Public Works was the product of a combination and conspiracy entered into for the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor. Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.

18. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company it was inducing, if not acting in concert with the Board of Permit Appeals (other than its President), to subvert the constitutional function of that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

V

EFFECTS OF THE COMBINATION AND CONSPIRACY

19. The aforementioned combination and conspiracy has had, and unless restrained will continue to have, the following effects:

(a) Competition among and between restaurants in San Francisco has been substantially suppressed and eliminated;

(b) The efficacy of McDonald's restaurants as a competitive force in the restaurant business in San Francisco has been substantially curtailed;

(c) The general public has been denied the benefits of a full range of McDonald's locations

within San Francisco and has thus been denied the advantages of competition via high quality food at low prices in a wholesome family atmosphere which would otherwise have occurred;

(d) The students who are employed by McDonald's restaurants on a part time basis have been denied the employment opportunities which otherwise would have been presented and the substantial social and economic advantages which would otherwise have accrued to the community;

(e) Price competition in the sale and distribution of food products through restaurants in San Francisco has been substantially reduced and eliminated.

VI
INJURY TO PLAINTIFF

20. As a direct and proximate consequence of the combination and conspiracy hereinbefore alleged, as planned and calculated by defendants, plaintiffs have been deprived of profits it would otherwise have made and its good-will, image and reputation have been damaged and impaired, all to their damage in an approximate and reasonable amount of Three Million Seven Hundred Thousand Dollars ($3,700,000).

WHEREFORE, plaintiff prays that the Court adjudge and decree as follows:

A. Judgment be entered against defendants for $11,100,000, which is treble the amount of damages suffered by plaintiff as provided in Section 4 of the Clayton Act;

B. That defendants and each of them be perpetually enjoined from continuing the aforesaid combination and conspiracy;

C. Plaintiffs be awarded a reasonable attorney's fee, and costs of litigation as required by Section 4 of the Clayton Act;

D. For such other and further relief as the Court deems just and proper.

DATED: January 2, 1973.

BLECHER & COLLINS
MAXWELL M. BLECHER
HAROLD R. COLLINS, JR.
GARY W. HOECKER
By /s/ Maxwell M. Blecher
Maxwell M. Blecher
Attorneys for Plaintiffs

APPENDIX F.

Pertinent Excerpts From Proposed Second Amended Complaint for Damages and Injunctive Relief.

United States District Court, Northern District of California.

Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., Plaintiffs, v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders and Hotel, Motel and Club Service Workers, an unincorporated association, Golden Gate Restaurant Association, a corporation, and Hotel Employers Association of San Francisco, a corporation, Defendants. No. C-73-0012-SW.

FRANCHISE REALTY INTERSTATE CORPORATION and McDONALD'S SYSTEMS OF CALIFORNIA, INC., plaintiffs herein, demanding trial by jury, bring this action for damages and injunctive relief, and complain and allege as follows:

. . . .

IV
OFFENSE ALLEGED

16. Beginning in or about 1971, the precise date being to plaintiffs unknown, and continuing thereafter up to and including the date of this complaint, defendants have conspired and combined among themselves and with competing restaurant operators and with other persons as yet unknown to restrain trade and commerce in the restaurant business in the City and County of San Francisco in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

17. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of

action, the substantial terms of which have been and are:

(a) Motivated by an intent to deter plaintiffs from pursuing building permits for restaurants and to effectively foreclose plaintiffs from free and unlimited access to the Department of Public Works and the Board of Permit Appeals, the defendants would appear before the Board of Permit Appeals of the City and County of San Francisco and would oppose each and every permit granted to the Company by the San Francisco Department of Public Works;

(b) The defendants would secretly solicit the appearance before the Board of such of its members and other persons as it could secure to support its opposition to issuance of each such permit and that such other persons, while purportedly acting on behalf of themselves in said appearances, were acting on behalf of defendants, which fact was not revealed to the Board;

(c) That all or substantially all of the persons who made an appearance before the Board in opposition to plaintiffs were members of defendants or were secretly solicited by defendants;

(d) That the defendants would threaten lack of political support to such Board members and other city officials who supported plaintiffs as were necessary;

(e) That defendants would engage in massive concerted action which was designed to engender public wrath against plaintiffs and which included, *inter alia*, the following activities:

(i) The knowing and malicious instigation and sponsorship, including financial support, by them-

selves and others acting secretly on their behalf of proceedings before the Human Rights Commission;

(ii) The knowing and malicious instigation and sponsorship, including financial support, by themselves and others acting secretly on their behalf of proceedings before the California Division of Labor Law Enforcement concerning business practices of McDonald's;

(iii) The dissemination of malicious and false statements through the news media designed to arouse public wrath against McDonald's;

(iv) Harassment of plaintiffs' customers at existing McDonald's restaurants; and

(v) Illegal picketing and disruption of the delivery of essential supplies to existing McDonald's restaurants.

18. The conduct described in paragraphs 16 and 17 herein was unlawful in that neither defendant was acting in good faith; instead the consistent, repeated and baseless opposition to the permits accorded the Company by the Department of Public Works was the product of a combination and conspiracy entered into the explicit purpose of insulating restaurant operators in San Francisco from the competition of McDonald's restaurants and each such opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals of the City and County of San Francisco, and thereby interfere directly with the business activities and relationships of a competitor.

Such opposition specifically undertook to injure and suppress the activities of a competitor who offered quality food at low prices in a family atmosphere.

19. Moreover, each defendant knew its activities to be unlawful and knew them to be a sham and frivolous in that each was well aware of the fact that the Company had intended to and did comply with all of the necessary code requirements, ordinances and regulations applicable to the conduct of its proposed restaurants and that the Board of Permit Appeals of the City and County of San Francisco had absolutely no authority, right, duty or responsibility to act as an economic board of review with the power to determine who and on what terms competition shall exist within the confines of San Francisco. Each defendant thus knew that by its plan of systematic, indiscriminate and wanton attack on the Company and its strong political position it was inducing, if not in concert with the Board of Permit Appeals (other than its President), to subvert and abuse the constitutional function of that Board and to do no more than frustrate McDonald's restaurants as a competitive factor in the City and County of San Francisco.

. . . .

DATED: May 16, 1973.

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GARY W. HOECKER
By /s/ Gary W. Hoecker
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